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HAROLD B. WILLEY,

Supreme Court of the United States

October Term, 1954

No. 741

WALTER JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

THURGOOD MARSHALL,
JACK GREENBERG,
Counsel for Petitioner.

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County, Mississippi on motion for new trial (R. 205-224).[1] The judge of the Circuit Court of Harrison County, Mississippi held on the merits that there was no systematic exclusion of Negroes from grand juries, although he stated that "I don't remember too many (Negroes) serving on the grand jury . . . " (R. 327, 28).

The Supreme Court of Mississippi also decided against petitioner's constitutional claim on the merits and held that there was no proof of systematic exclusion. It held that "[a]ppellant also argues that there has been a systematic exclusion of, and a discrimination against, Negroes serving on the grand jury and the petit jury, in violation of the rule in *Patton* v. *State*, 332 U. S. 463.[2] . . . [n]o Negro jurors served on the particular grand jury and petit jury involved in this case, but appellant makes no showing whatever that there was any systematic exclusion of the names of Negroes from the jury box or panels." (76 So. 2d Adv. 841, 844, Appendix, *infra* p. 7a).

Question Presented

Whether petitioner was denied rights guaranteed by the Fourteenth Amendment to the United States Constitution where he has been sentenced to death following indictment by a grand jury in a county where but two Negroes have served on grand juries during the last 35 years.

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[1] "R." refers to the Transcript of Record. The page number following "R." is that which appears on the bottom of the page.

[2] *Patton* v. *Mississippi*, 332 U. S. 463, held that there had been a denial of rights conferred by the Fourteenth Amendment where the petitioner had been convicted following an indictment by grand jury from which Negroes had been systematically excluded.

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Statement

Petitioner, a 17-year old Negro was a member of the Air Force, stationed at the United States Air Base, Keesler Field, Mississippi. On March 30, 1954 a 20-year old white resident of Mississippi and her 15-year old sister complained that they were accosted on a main street in Biloxi by a Negro man in woman's clothing and compelled to enter a vacant shed off the street at knife point. There the Negro "woman" compelled the older woman to submit to a sodomous act and then to sexual relations (R. 43-52). Shortly after their release the young women complained to the police. An alarm went out and a few minutes thereafter petitioner was stopped for questioning at the Keesler Air Force Base to which he was returning with a bundle of woman's clothing under his arm (R. 97-99). He was examined and found to be wearing woman's underclothing (R. 100). The chief clinical psychologist of the United States Veterans Hospital in Gulfport, Mississippi later testified on motion for new trial that petitioner is a transvestite (R. 257), and had developed sexual deviations at an early age, that he "was not conscious of right and wrong" and had a "strong uncontrollable compulsion and a tendency to secure pleasure on immature levels of erotic gratification" (R. 251).

He was indicted (R. 2), tried, and convicted of the crime of rape without recommendation of mercy (R. 17-18). The death penalty was mandatory (R. 6).

On motion for new trial petitioner asserted denial of his fundamental constitutional right not to be convicted of a capital crime following indictment by a grand jury from which members of his race had been systematically excluded (R. 205-224).

The trial court (R. 327, 28) and the Supreme Court of Mississippi (76 So. 2d 841, 844; Appendix *infra* p. 1a),

decided against petitioner, upon the merits, that Negroes had not been systematically excluded from grand juries in Harrison County.

Reasons for Granting the Writ

The decision of the Supreme Court of Mississippi is in clear conflict with the decisions of this Court in that petitioner's conviction and sentence of death were affirmed in the face of uncontradicted testimony of systematic exclusion of Negroes from grand juries in Harrison County, Mississippi.

Where there is a claim of denial of constitutional right this Court will go behind the factual findings of the courts below and assess that claim on the basis of the uncontradicted evidence. *Norris* v. *Alabama*, 294 U. S. 587, 590; *Chambers* v. *Florida*, 309 U. S. 227, 228-229; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 147-148; *Craig* v. *Harney*, 331 U. S. 367, 373-374. The uncontradicted evidence in this case is as follows:

There was no Negro on the grand jury which indicted petitioner (R. 208). The Clerk of the Court in which petitioner was tried testified that he had been Clerk for six years (R. 205) before which he was deputy clerk for 29 years (R. 218, 220). During these 35 years he has apparently been present at all the empanelings of grand juries in Harrison County (R. 220, 221, 222). On only one occasion during these 35 years does he recall any Negroes serving on grand juries:

> "*By Mr. Wiggington*:
>
> Q. I believe you told Mr. Holleman that in your recollection, I believe you said that you were Clerk for six years but you don't remember if it was when you were Clerk or Deputy Clerk that you remember

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two negroes being on the Grand Jury? A. It was about the time or just before Mr. Ramsay died. That's a little more than six years ago.

Q. Six years ago? And that is the only time that you have recollection of negroes serving on the Grand Jury; is that right? A. That is the only time that I recall them serving on the Grand Jury"[3] (R. 219-220).

The state made no effort to contradict this testimony. Its inquiry was merely directed to whether the two Negroes had served six years or four years ago (R. 191). The trial judge substantially confirmed the Clerk's testimony in stat-

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[3] The Clerk in selecting the Grand Jury, must choose from names that are furnished to him by the board of supervisors of the county. Section 1766, Mississippi Code of 1942 governs:

"How List of Jurors Procured.—The board of supervisors at the April meeting in each year, or at a subsequent meeting if not done at the April meeting, shall select and make a list of persons to serve as jurors in the circuit court for the twelve months beginning more than thirty days afterwards, and as a guide in making the list they shall use the registration book of voters, and shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take then as nearly as they conveniently can, from the several supervisors district in proportion to the number of qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors. The clerk of the circuit court shall put the names from each supervisor's district in a separate box or compartment, kept for the purpose, which shall be locked and kept for the purpose, which shall be locked and kept closed and sealed, except when juries are drawn, when the names shall be drawn from each box in regular order until a sufficient number is drawn. The board of supervisors shall cause the jury box to be emptied of all names therein, and the same to be refilled from the jury list as made by them at said meeting."

See also §§ 1762, 1772, 1779.

ing that "I don't remember too many (Negroes) serving on the Grand Jury" (R. 327)[4]

In the face of the clear uncontradicted testimony, the assertion by the Mississippi Supreme Court that "the evidence offered by appellant is to the contrary and negatives his allegations" (that Negroes were systematically excluded) is incorrect.

Harrison County has a population of 13,421 non-whites among its 70,652 whites,[5] and has 1600 registered Negro voters among 26,000 white voters (R. 212-213). It is incredible that no Negro (with but two exceptions, six years ago) qualified for jury service in 35 years if there were not severe discrimination against members of that race. In the words of this Court ". . . if it can possibly be conceived that all of them were disqualified for jury service by reason of crime, habitual drunkeness, gambling, inability to read and write, or to meet any other or all of the statu-

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[4] There was no testimony contradicting the fact that no other Negroes had ever served on Harrison County Grand Juries. The state however tried to raise an inference that there possibly might have been others:

> "By Mr. Holleman: You wouldn't say that was the only time that they ever served though, would you?
> By the Witness: No sir."

In view of the Clerk's explicit testimony and presence at the empanellings, this admission of a mere mathematical possibility appears to be devoid of substantive meaning.

Neither is the uncontradicted testimony rebutted by the Clerk's statement that he had not been "party to" nor had he "witnessed systematic exclusion of the members of the negro race for jury duty in Harrison County, Mississippi" (R. 222-223). The Clerk had to draw from lists furnished to him, and he had neither knowledge nor responsibility concerning their composition (R. 217, 222-223). See also Section 1766, Miss. Code of 1942, *supra*.

[5] 1950 Census of Population; Vol. II, Characteristics of the population, part 24, Mississippi.

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tory tests, we do not doubt that the state could have proved it." *Patton* v. *Mississippi*, 332 U. S. 463, 468.

It has been the clear and consistent rule of the court that a conviction of a Negro upon an indictment handed down by a grand jury from which Negroes were systematically excluded violates the 14th Amendment to the Constitution of the United States. This proposition has been repeatedly reaffirmed, e.g., *Strauder* v. *West Virginia*, 100 U. S. 303; *Pierre* v. *Louisiana*, 306 U. S. 354; *Patton* v. *Mississippi*, 332 U. S. 463; *Cassel* v. *Texas*, 339 U. S. 282.

Thus the decision below conflicts with this Court's rule.

"When a jury selection plan, whatever it is, operates in such a way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand," *Patton* v. *Mississippi*, 332 U. S. 463, 469.

It is therefore clear that the decision of the Supreme Court of Mississippi would take petitioner's life without due process of law and in denial of the equal protection of the laws.

WHEREFORE for the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

THURGOOD MARSHALL,
JACK GREENBERG,
Counsel for Petitioner.

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APPENDIX

Opinion of Ethridge, *J.*

ETHRIDGE, *Justice*:

Walter Johnson, the appellant, was convicted in the Circuit Court of Harrison County of the crime of Rape, and was sentenced to suffer the death penalty. Code of 1942, Sec. 2358. The crime occurred around 10:30 P. M. on the night of March 30, 1954, in the City of Biloxi, Harrison County, Mississippi. It is undisputed that appellant committed the offense. The prosecutrix, a young white married woman, testified that appellant had a knife and threatened the life of herself and her sister, with whom she was going home, unless she submitted to his demands.

She unequivocally identified Johnson as the culprit, and she had ample opportunity to observe him on the occasion in question. Her sister also definitely identified appellant. Dr. W. A. Tisdale, who examined the prosecutrix shortly after the rape occurred, testified concerning the condition of her body after the rape, and his examination fully confirmed her statements. Appellant, a Negro, was a soldier stationed at Keesler Field. Corporal Zike arrested him when he returned to Gate Number One around 11:05 P. M. that night, and took a knife from him. Appellant made an oral confession to Sergeants Etheridge and Hill of the Air Force Police, in which he admitted the crime and the use of the knife which was taken from him as the instrument of coercion. Assistant Chief of Police Walter Williams and Captain Charlie Comeaux, of the Biloxi Police Department, testified that appellant signed two separate written confessions of the crime, one dated March 30, 1954, and another April 7, 1954; and that these confessions were wholly voluntary and made without any coercion or promise of leniency. They admitted appellant's premeditated, criminal rape of the prosecutrix. Appellant did not testify,

either on the preliminary hearing concerning the confessions or on the merits. He offered no evidence and made no issue as to the admissibility of the confessions. Since there is no dispute as to the facts, we will not undertake to outline the repulsive details of appellant's crime.

Appellant argues that the verdict of the jury is against the great weight of the evidence. However, this record contains no dispute of the State's testimony and Johnson's two confessions that he committed the crime. Apparently the argument on this point is the claim that the prosecutrix did not offer sufficient resistance to the commission of the crime. But the record shows that she and her sister, who was present at the time, were rendered incapable of physical resistance because of the fact that appellant had with him a large knife with which he threatened to kill both the prosecutrix and her sister if they resisted or cried out. Where the act is accomplished after the female yields through fear caused by immediate threats of great bodily injury, there is compulsive force and the act is rape. Actual physical force or actual physical resistance is not required where the female yields through fear under a reasonable apprehension of great bodily harm. Here the threats were made before the act through the exhibition of, and threat to use, a deadly weapon, a knife. Actual physical resistance by the female is not required in such circumstances. 75 C. J. S., Rape, Sec. 15; Milton v. State, 142 Miss. 364, 107 So. 423 (1926); McGee v. State, 40 So. 2d. 160, 171 (Miss. 1949).

The trial court committed no error in admitting into evidence the two confessions of appellant. It is undisputed that appellant was fully advised as to his rights and that he made the statements voluntarily, without coercion of any kind. Appellant did not testify upon the preliminary examination as to their admissibility and offered no evidence that such statements were not voluntary. There is

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no evidence that he was overawed, frightened or intimidated by the officers, as appellant assertss.

On the voir dire examination, the juiror Scarborough had been accepted as a juror by the State. He had testified that he had no conscientious scruples agaainst the imposition of capital punishment. While being qquestioned by the defendant's attorney, Scarborough changeed his prior testimony, and said that he had a strong conviiction against the imposition of capital punishment. The ceourt then interrogated him and was advised by him that hie did not believe in capital punishment. Thereupon the triaal judge excused Scarborough as a juror, and stated that he wanted the jury to understand that the court was taking no part in the decision on the facts, that whether appelllant was guilty, and, if so, the type punishment he shoulld receive, were questions for the jury, but that since Scarborough did not believe in capital punishment, that was aa disqualification in a capital case. Appellant says that tlhe effect of the court's action was to advise the jury thatt their readiness to inflict capital punishment was their most important qualification, and that this action prejudiced the jury against appellant.

In cases where the death penalty can lbe imposed by a jury, it is the duty of the judge to inquiire of the jurors whether they have conscientious convictioms against inflicting the death penalty. Phenizee v. State, 180 Miss. 746, 178 So. 579 (1938). A somewhat similar case to the instant one on this question is Lewis v. State, 9 S. and M. 115 (Miss. 1847). The court was performing its duty in this respect, and committed no error in acting as it did. We find no prejudice to appellant resulting from this incident.

Appellant made no point either before or during the trial that he was insane and incapable of distinguishing between right and wrong as to the particular acts with which he was charged, or at the time of the trial. He

filed no suggestion of insanity nor any other pleading raising that issue before or during the trial. He did not testify in his own defense, and the only witness he offered was Captain Robert W. McGill, the commanding officer of the Student Squadron of which appellant was a member. He testified that appellant came to the squadron on January 1, 1954, and that he is 17 years of age (18 now). He knew nothing about the alleged crime. Appellant's counsel asked McGill his opinion of appellant's mental age, and what peculiarities he displayed. Appellant's attorney stated that he was not pleading insanity. After that statement the trial court sustained an objection to those questions. If appellant had pleaded insanity, they would have been proper. In fact, the district attorney on the trial conceded that. However, since in the trial on the merits appellant's counsel advised the court that he was not pleading insanity, the court was not in error in sustaining that objection to the stated questions to McGill. Appellant asked for and obtained no instructions on the question of sanity, and did not submit that issue to the jury.

Appellant filed a motion for a new trial, which set up two new points not previously raised by him: (1) Newly discovered evidence which would show that appellant was insane at the time of the crime, during the trial, and subsequent thereto, and that Dr. H. L. Deabler, a clinical psychologist, had examined appellant and made this diagnosis; (2) that no Negroes were summoned to serve on the panel from which the grand jury and petit jury were drawn.

On the hearing of this motion for a new trial, appellant offered, to support his contention of insanity, Dr. H. L. Deabler. He is the chief clinical psychologist at the Veterans Administration Hospital in Gulfport. The substance of his lengthy testimony is that appellant has a gross overdevelopment of the sexual impulse; and it has resulted in his taking on feminine ways and being attracted to feminine

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things. On the occasion of this rape, appellant was wearing women's clothing, including underwear. Dr. Deabler said that appellant had failed to develop a sense of right and wrong or a "healthy conscience"; that appellant at the time of the rape had "a strong uncontrollable compulsion" and therefore was not conscious of right and wrong. His acts are characterized by transvestitism and voyeurism.

However, he stated that he had made a psycho-diagnostic test to determine appellant's sanity, and that this test showed him to be "sane in our sense, in contact with reality." He was not psychotic and was not insance, from a psychologist's point of view, but Dr. Deabler thought that he was legally insane, since he thought that appellant had such an uncontrollable compulsion that he did not know the difference between right and wrong. Appellant's intelligence is average for a 17-year-old boy, in terms of ability to think, to handle school work "and that sort of thing." Dr. Deabler had not read appellant's confession and had gained his data largely from a two-hour conference with appellant, and from talking to his attorney. The fact that after appellant originally approached the prosecutrix and her sister, he walked away from them temporarily when a truck approached, indicated a fear of being caught, but the doctor did not believe it indicated a sense of doing something wrong. Appellant is not suffering from any mental disease, but a psychological disorder.

In rebuttal of this testimony, the State offered the chief of police of Biloxi, the assistant chief of police, and a policeman, all of whom had talked with appellant on a number of occasions since he had been in custody, and all of whom said that in their opinions he was entirely sane and knew the difference between right and wrong; and that they had discussed the crime with appellant, and he appeared to realize that what he had done was wrong. In overruling the motion for a new trial, the court stated that in view

of the testimony of the State's witnesses the psychologist, and his own observation of the defendant, he was satisfied that the net result of their testimony and of the evidence is that defendant knew right from wrong and was and is sane.

We think that this conclusion of the trial court is amply warranted. This Court rejected the "irresistible impulse" test of sanity as early as 1879, in Cunningham v. State, 56 Miss. 269. To the same effect are Garner v. State, 112 Miss. 317, 73 So. 50 (1916); Smith v. State, 96 Miss. 786, 49 So. 945 (1909); Eatman v. State, 169 Miss. 295, 153 So. 381 (1934); Anno. 70 A. L. R. 659, and 173 A. L. R. 391; 14 Am. Jur., Criminal Law, Sec. 35; 15 Am. Jur., Criminal Law, Sec. 327; 22 C. J. S., Criminal Law, Sec. 58. We apply the test of the leading English case known as M'Naghten's case, which is the majority rule. 14 Am. Jur., Criminal Law, Secs. 38-40; 22 C. J. S., Criminal Law, Sec. 59; Rogers v. State, No. 39,466, decided January 10, 1955. It is summarized in Eatman v. State, supra:

> "In this state, as generally in the several states, the rule of law is that the test of criminal responsibility is the ability of the accused, at the time he committed the act, to realize and appreciate the nature and quality thereof—his ability to distinguish right and wrong. Smith v. State, 95 Miss. 786, 49 So. 945, 946, 27 L. R. A. (N. S.) 461, Ann. Cas., 1912A, 23. And the defense of want of inhibitory powers, or as otherwise expressed, the defense of irresistible or uncontrollable impulse was declared in that case to be unavailable, unless the uncontrollable impulse spring from a mental disease existing to such a high degree as to overwhelm the reason, judgment, and conscience, in which case, as the court adds, the accused would be unable to distinguish the right and wrong of a matter."

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The testimony of appellant's own witness, Dr. Deabler, fails to meet these criteria. In fact, Deabler applied the so-called irresistible impulse test, which this Court has rejected. On the contrary, the testimony of the State's witnesses, who have had opportunity to form an opinion about appellant's sanity, amply justified the trial court's finding of sanity and its overruling of the motion for a new trial. Considering the entire record on this appeal, including appellant's two signed confessions with their logical and intelligible descriptions of his crime, we think that the trial court was correct in this respect, and certainly it cannot be said to be manifestly wrong.

Appellant also argues that there has been a systematic exclusion of, and a discrimination against, Negroes in serving on the grand jury and the petit jury, in violation of the rule in Patton v. State, 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76, 1 A. L. R. 2d. 1286 (1947). Without detailing the testimony of the only witness offered on this issue, which was not raised until the motion for new trial, it is sufficient to say that the testimony of the Circuit Clerk of Harrison County, Ewert Lindsey, shows without dispute that there has been no systematic exclusion of Negroes from juries in Harrison County, and that, in fact, at practically every term of court Negro jurors are drawn out of the box; and that no effort was made to discriminate either in selecting jurors for the box or in drawing jurors. No Negro jurors served on the particular grand jury and petit jury involved in this case, but appellant makes no showing whatever that there was any systematic exclusion of the names of Negroes from the jury box or panels. In fact, the evidence offered by appellant is to the contrary and negatives his allegation.

For these reasons the judgment of the circuit court is affirmed.

AFFIRMED, and Thursday, March 3, 1955, is fixed as the date for execution of the death sentence in the manner provided by law.

ALL NINE OF THE JUDGES CONCUR.